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RAKESH RAM TAWAR

v.

TIMBALAN MENTERI KESELAMATAN DALAM NEGERI, MALAYSIA & ORS

B

HIGH COURT MALAYA, SHAH ALAM
NALLINI PATHMANATHAN JC
[CRIMINAL APPLICATION NO: MT(4)-44-1-2008]
2 MAY 2008

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PREVENTIVE DETENTION: *Detention order - Application for habeas corpus - Applicant filed second application for habeas corpus after first application dismissed - Whether issues raised in second application ought to have been advanced and litigated in first application - Res judicata - Abuse of process of court - Special or exceptional circumstances*

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The first respondent issued an order of detention against the detainee ('applicant') for a period of two years pursuant to s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('Ordinance'). The applicant then filed an application for the issuance of a writ of *habeas corpus* challenging the validity of the detention order on the ground that there was no evidential basis or reason for its issuance. This application was heard and dismissed by the High Court, which decision the applicant did not appeal against. The applicant subsequently filed a second application for the issuance of a writ of *habeas corpus* in this court in respect of the same detention order through different solicitors. This second application challenged the validity of the detention order on the basis that there was procedural non-compliance with certain provisions of the Ordinance, the Public Order and Prevention of Crime (Procedure) Rules 1972 and the Federal Constitution. The respondents, in response to this, lodged a preliminary objection contending that the second *habeas corpus* application should not be heard or determined by this court by reason of the application of the principle of *res judicata*, whereby it was argued that the present proceedings amounted to an abuse of the process of the court.

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Held (dismissing the preliminary objection):

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(1) In the first *habeas corpus* application, the applicant could have, but failed to, put forward legal arguments relating to non-compliance with mandatory procedural requirements, which he then sought to do in the second application. *Prima facie*, the

plea of *res judicata* and an abuse of process appeared to be correctly taken. However, it is equally clear that while a litigant may be correctly penalised under this doctrine for holding back arguments that could have been taken in the first application, the courts have recognised, *albeit* rarely, that in cases where special or exceptional circumstances arise which merit the preclusion of the doctrine, then the plea of abuse of process may be rejected, particularly so where the liberty of a person is in issue, as in the instant case. On the facts of the present case, the first application filed by the applicant was misconceived in that it was premised on legal arguments that were doomed to failure under the law as it stands. To that extent, the applicant was prejudiced in his first application by the failure of his first set of solicitors to appreciate the current position in law. The fact that his solicitors were not apprised of the current position in law on this issue could not be attributed to the applicant as he relied entirely on their legal expertise. Thus, this case warranted special consideration since the applicant could not be faulted for taking an erroneous legal path in his first application. He could not be said to have 'held back' legal arguments for use in a subsequent application. Further, special consideration was also required since this application related to the applicant's liberty. Therefore, on the special and exceptional facts of this case, it appeared that there was no abuse of process in the filing of the second *habeas corpus* application. (paras 18, 19, 20, 21 & 22)

Case(s) referred to:

Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 3 CLJ 914 FC ***(refd)***

Lorrain Esme Osman & A Writ of Habeas Corpus, Re Ad Subjiciendum [1991] 3 CLJ 1693; [1991] 4 CLJ (Rep) 1260 QBD ***(refd)***

Re Tarling [1979] 1 All ER 981 ***(refd)***

Superintendent of Pudu Prison & Ors v. Sim Kie Chon [1986] 1 CLJ 548; [1986] CLJ (Rep) 256 SC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25(2)

Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3(2), 4(1), 5(1), (2)

Federal Constitution, arts. 5(1), 151(2)

Public Order and Prevention of Crime (Procedure) Rules 1972, r. 6

Administration of Justice Act 1960 [UK], s. 14(2)

A *For the applicant - O Alvinthiren Nair; M/s Alvinthiren & Partners*
For the respondents - Tuan Najib Zakaria; A-G's Chambers

Reported by Suresh Nathan

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JUDGMENT

Nallini Pathmanathan JC:

[1] On 13 October 2006 the Deputy Minister of Home Affairs,
C ('the first respondent') issued an order of detention against Rakesh a/l Ram Tawar ('the detainee') for a period of two years pursuant to s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the detention order'). The detainee then filed an application for the issuance of a writ of *habeas corpus*
D challenging the validity of the detention order, in the High Court at Kuala Lumpur *vide* application no. 44-44-2007 ('the first *habeas corpus* application'). This application was heard and dismissed by the High Court at Kuala Lumpur on 18 October 2007. The detainee did not file an appeal against this decision to the Federal
E Court.

[2] Subsequently on 6 November 2007 the detainee filed a second application for the issuance of a writ of *habeas corpus* in this court in respect of the same detention order through different
F solicitors ('the second *habeas corpus* application'). In response to this, the respondents lodged a preliminary objection contending that the second *habeas corpus* application should not be heard or determined by this court by reason of the application of the principle of *res judicata* whereby it is argued that the present
G proceedings amount to an abuse of the process of the court. The respondents contend that the proper course to have been adopted by the detainee when his first application was dismissed on 18 October 2007 should have been an appeal to the Federal Court. The filing of the second *habeas corpus* application in this
H court, it was maintained, amounted to an attempt to circumvent such an appeal. Finally the respondents contend that this court has no jurisdiction to decide on the second *habeas corpus* application before it because the subject matter of the detainee's complaint lies within the appellate jurisdiction of the Federal Court,
I and not this court. The respondents therefore seek an order dismissing this second application for *habeas corpus* at this stage.

The Plea Of *Res Judicata*

[3] *Res judicata* is defined in *Black's Dictionary* as follows:

> *res judicata* (Latin "a thing adjudicated") 1. An issue that has been definitively settled by judicial decision. 2. *An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.*
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> > *"Res judicata"* has been used in this section as a general term referring to all of the ways in which one judgment will have a binding effect on another. That usage is and doubtless will continue to be common, but it lumps under a single name two quite different effects of judgments. *The first is the effect of foreclosing any litigation of matters that have never been litigated, because of the determination that they should have been advanced in an earlier suit.* The second is the effect of foreclosing relitigation of matters that have once been litigated and decided. The first of these, preclusion of matters that were never litigated has gone under the name 'true *res judicata*' or the names, 'merger' and 'bar'. The second doctrine, preclusion of matters that have once been decided has usually been called 'collateral estoppel'.

[4] The issue that falls for consideration at the outset is whether the plea of *res judicata* is correctly taken, and if so, which form of the plea applies, ie, whether it is the foreclosure of the relitigation of matters that were taken up and adjudicated upon in the first *habeas corpus* application or whether it is a preclusion of the litigation of matters that could have been, but were never litigated in the first *habeas corpus* application. This in turn requires a thorough examination and comparison of the two applications.

The First *Habeas Corpus* Application

[5] The first *habeas corpus* application was filed in or around 13 April 2007. In it, the detainee through his first set of solicitors, sought relief against two respondents, namely the officer in charge of the detention centre in Simpang Renggam, Johor and the Ministry of Home Affairs, rather than the Minister of Home Affairs. In support of the application, a total of two affidavits were filed. In essence, the detainee challenged the validity of the

detention order on the grounds that there was no reasonable or plausible basis or reason for the Minister to issue such a detention order as there was no evidence that the detainee was involved in armed gang robbery. He substantiated this by contending that none of the victims of the crime identified him and he had not been charged in any court *albeit* in Ipoh, Kulim or Kuantan. Additionally the detainee argued that he suffered from diabetes, high blood pressure and chronic sinusitis and that his health would be compromised by continued detention. The detainee was a student of engineering prior to his detention and the continued detention precluded him from continuing with his education. These grounds, broadly summarized comprised the basis for the first *habeas corpus* application. It is notable that the detainee in his application has omitted to allude to any allegations of a failure to comply with mandatory procedural requirements under the provisions of the Ordinance or the Federal Constitution.

The Second *Habeas Corpus* Application

[6] In his second *habeas corpus* application filed through a different set of solicitors was filed in January 2008. In this second application, the detainee has alleged that there has been non-compliance with the provisions of ss. 3(2), 5(1) and 5(2) of the Ordinance. It is further contended that the advisory board failed to comply with the procedure provided in art. 151(2) of the Federal Constitution, in that the Chairman does not possess requisite qualifications. He further complains that the provisions of art. 5(1) of the Federal Constitution were breached in that the reasons for his detention were never explained to him; neither was he advised that he could be represented by a lawyer. Further issues are pleaded including for example, that the order issued under s. 4 is not in compliance with the Ordinance, as well as contraventions of r. 6 of the Public Order and Prevention of Crime (Procedure) Rules 1972 ('the Rules') and art. 151 of the Constitution although these arguments are not ventilated in full in the affidavits.

A Comparison Of The First And Second *Habeas Corpus* Applications – Does The Plea Of *Res Judicata* Apply?

[7] The following is evident from the examination and comparison of the two applications:

(a) The factual matrix comprising the basis for both the first and second *habeas corpus* applications is the same. It comprises the period from his arrest, remand and final detention pursuant to the order issued by the Deputy Minister;

(b) The second *habeas corpus* application challenges the validity of the detention order on the basis that there is procedural non-compliance with the provisions of the Ordinance, the Rules and the Federal Constitution. The first *habeas corpus* application relies on the ground that there was no evidential basis or reason for the issuance of the detention order.

[8] The basis or grounds for the first and second applications for *habeas corpus* therefore differ while the factual matrix is identical, as is the detention order sought to be invalidated. This is borne out by a perusal of the chronology of facts.

[9] As such it would appear that the plea of *res judicata* in the wider sense is relevant in the context of the instant case. The plea is taken in the context that the issues raised in the second *habeas corpus* application ought to have been advanced and litigated in the first application.

[10] Applying the definition in *Black's Dictionary* it would appear that the three elements have been met:

1. An issue that has been definitively settled by judicial decision;
2. A final judgment on the merits; and
3. The involvement of the same parties or parties in privity with the original parties.

[11] The issue that has been definitively settled by judicial decision is whether the detention of the detainee is unlawful. There is also a final order dated 18 October 2007 handed down after the first *habeas corpus* application had been heard on its merits. The parties involved are the same.

Is The Principle Of *Res Judicata* Applicable To Criminal Matters And *Habeas Corpus* Applications?

[12] Section 25(2) of the Courts of Judicature Act 1964 ('CJA') which confers additional powers to the High Court as set out in the Schedule to the CJA, expressly recognizes the doctrine of *res judicata* and provides that the High Court is empowered to "...

dismiss or stay proceedings where the matter in question is *res judicata* between the parties …". The doctrine of *res judicata* should therefore be applicable and relevant in criminal proceedings, including applications for *habeas corpus*, in as much as it is so in civil proceedings.

[13] The applicability of the principle of *res judicata* in criminal matters is comprehensively set out in *Superintendent of Pudu Prison & Ors. v. Sim Kie Chon* [1986] 1 CLJ 548; [1986] CLJ (Rep) 256 where Eusoffe Abdoolcader J (as he then was) explained the position thus:

> … The appellants plead *res judicata* in this regard and we think the point is well taken and is supported by authority, and we would refer to the pronouncement of the Privy Council in *Hoystead & Ors. v. Commissioner of Taxation* [1926] AC 155 and a catenation of cases to the like effect, *namely that the plea of res judicata applies, except perhaps where special circumstances may conceivably arise of sufficient merit to exclude its operation, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.*
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> There is moreover the inherent jurisdiction of the court in cases where *res judicata* is not strictly established, and where estoppel *per rem judicatam* has not been sufficiently pleaded, or made out, but nevertheless the circumstances are such as to render a reagitation of the questions formally adjudicated upon a scandal and an abuse, the Court will not hesitate to dismiss the action, or stay proceedings therein, or strike out the defence thereto, as the case may require. It would suffice in this regard to refer to the judgment of the Privy Council delivered by Lord Wilberforce in *Brisbane City Council and Myer Shopping Centres Pty. Ltd.v. Attorney-General for Queensland* [1979] AC 411 (at p. 425):
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> > The second defence is one of *'res judicata'*. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram V-C in *Henderson v. Henderson* [1843] 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v. Commissioner of Taxation* [1926] AC 155. A recent

application of it is to be found in the decision of the Board in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] AC 581. It was in the judgment of the Board, there described in these words:

... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.

[14] Accordingly it follows that any issues of non-compliance with mandatory procedural rules ought to have been advanced and litigated in the first *habeas corpus* application and that any attempt to do so in the second application would be correctly resisted by a plea of *res judicata* in the wider sense, unless there exist exceptional or special circumstances of sufficient merit to warrant the exclusion of the operation of the principle.

[15] In the Privy Council decision of *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] AC 581 (above) Lord Kilbrandon explained the extent of the principle of *res judicata* thus:

... The second question depends on the application of a doctrine of estoppel, namely *res judicata*. Their Lordships agree with the view expressed by McMullin J that the true doctrine in its narrower sense cannot be discerned in the present series of actions, since there has not been, in the decision in no. 969, any formal repudiation of the pleas raised by the appellant in no. 534 ... *But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.* The *locus classicus* of that aspect of *res judicata* is the judgment of Wigram VC in *Henderson v. Henderson* [1843] 3 Hare 115, where the judge says:

... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent Jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was

A actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

B *The shutting out of a 'subject of litigation' a power which no court should exercise but after a scrupulous examination of all the circumstances is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to*
C *excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule …*

[16] It is apparent from all the foregoing cases on the doctrine of *res judicata* that notwithstanding the clear power of the court
D to exclude or prohibit a litigant from taking up in a subsequent litigation matters which he should properly have advanced in the earlier litigation, there exists an equally clear provision allowing for the non-operation of the doctrine where there are special circumstances which merit such preclusion of the principle. In
E *Superintendent of Pudu Prison v. Sim Kie Chin* (above) too, this exception to the applicability of the doctrine was expressly recognized by LJ Eusoffe Abdoolcader.

[17] In *re Tarling* [1979] 1 All ER 981 the applicant, as in this
F case, sought a renewed application for *habeas corpus* to secure his discharge from prison where he had been committed for return to Singapore where several charges had been brought against him by the Singapore Government. Peter Gibson J set out the position which relates to the position of an applicant who makes a second
G application for *habeas corpus* in respect of the same detention. It should be noted that the position in law in the United Kingdom is specifically provided for by statute in s. 14(2) of the Administration of Justice Act 1960. It stipulates expressly that no repeated application for *habeas corpus* may be made in respect of
H the same person on the same grounds. While there is no equivalent provision in Malaysia, the Schedule to the Courts of Judicature Act 1964 containing the additional powers of the High Court nonetheless empowers the court to dismiss or stay proceedings where the matter is *res judicata* between the parties.
I Accordingly the statement of the law relating to *res judicata* in *re Tarling* is relevant. Peter Gibson J in delivering the judgment of the court summarized the position thus:

> ... Before dealing with the questions of jurisdiction it is to be noted that, on two important principles, which bear on the position of an applicant for *habeas corpus* who seeks to make a second application in respect of the same detention, there is no substantial dispute between the parties in the case.
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> Firstly it is clear to the court *that an applicant for habeas corpus is required to put forward on his initial application the whole of the case which is then fairly available to him. He is not free to advance an application on one ground, and to keep back a separate ground of application as a basis for a second or renewed application to the court.*
>
> The true doctrine of estoppel known as *res judicata* does not apply to the decision of this court on an application for *habeas corpus*; we refer to the words of Lord Parker CJ, delivering the judgment of the court in *Re Hastings (no 2)* n1. *There is, however, a wider sense in which the doctrine of res judicata may be applicable, whereby it becomes an abuse of process to raise in subsequent proceedings matters which could, and therefore should, have been litigated in earlier proceedings: see the judgment of the Privy Council (Lord Morris, Lord Cross and Lord Kilbrandon) in Yat Tung Investment Co Ltd. v. Dao Heng Bank Ltd. [1975] AC 68. In our judgment, that principle is applicable to proceedings for habeas corpus, whether under the 1967 Act or under the general jurisdiction of the court although, no doubt, the stringency of the application of the principle may be different in cases concerning the liberty of the subject from that in cases concerning such matters as disputes on property ...*

[18] It is apparent that the court recognized that there would be cases where matters which should have been raised were not, but when raised in subsequent proceedings would not amount to an abuse of process.

[19] In the instant case, as in *re Tarling*, the applicant makes a second application in respect of the same detention order. In the first *habeas corpus* application he could have, but failed to put forward legal arguments relating to non-compliance with mandatory procedural requirements, that he now seeks to do in this second application. *Prima facie*, the plea of *res judicata* and an abuse of process appear to be correctly taken. However it is equally clear that while a litigant may be correctly penalized under this doctrine for holding back arguments that could have been taken in the first application, the courts have recognized, *albeit* rarely, that in cases where special or exceptional circumstances arise which merit the preclusion of the doctrine, then the plea of an abuse of process may be rejected. This is particularly so where the liberty of a person is in issue, as is the case here.

[20] The question that next arises for consideration is whether the applicant 'held back' the arguments relating to mandatory procedural non-compliance, which he seeks to raise in the present proceedings. As discussed earlier the applicant's first set of solicitors failed to raise any such issues, which if raised and found to be true, would have had some possibility of success. As drafted and put forward, the first application contained no merits warranting the issuance of an order of *habeas corpus*. This is because the entire basis for the first application was a challenge to the effect that the Minister had exercised his discretion without any basis or any reasonable basis in arriving at his decision to issue the order of detention. The law on this area has been clear, particularly since the decision of the Federal Court in *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors.* [2005] 3 CLJ 914. In that case it was held that with the amendments to the Ordinance, ISA 1960 and DD(SPM) Act 1985 made by Act A740, Act A739 and Act A738 respectively, which came into force on 24 August 1989, challenges to the Minister's detention order under s. 4(1) of the Ordinance could only be based on one ground, namely non-compliance with procedural requirements. Accordingly the first application filed by the applicant was misconceived, in that it was premised on legal arguments that were doomed to failure under the law as it stands. To that extent the applicant was prejudiced in his first application by the failure of his first set of solicitors to appreciate the current position in law. From these facts it is also clear that it cannot be said that the applicant 'held back' arguments that were available to him. The fact that his solicitors were not apprised of the current position in law on this issue cannot be attributed to him as he relied entirely on their legal expertise. The question that then arises for consideration is whether, given the somewhat exceptional facts of this case, the application of the doctrine of *res judicata* should be precluded in this instance.

[21] In *Lorrain Esme Osman & A Writ of Habeas Corpus, Re Ad Subjiciendum* [1991] 3 CLJ 1693; [1991] 4 CLJ (Rep) 1260 a similar point arose for adjudication when his counsel argued that they had delayed taking a particular legal point to available them in a prior application. Lord Justice Russell in delivering the judgment of the court stated *inter alia* as follows:

> ... we are not satisfied that where an applicant follows an arguable though erroneous legal path as recommended by his advisers, his late raising of an argument previously open to him should necessarily amount to an abuse of process of the type contemplated by Gibson J. In the special circumstances of this case therefore we do not hold that there was any abuse of process.

[22] The instant case also warrants special consideration as the applicant cannot be faulted for taking an erroneous legal path in his first application. He cannot be said to have 'held back' legal arguments for use in a subsequent application. This application relates to the applicant's liberty and therefore also requires careful consideration. On the special and exceptional facts of this case therefore it appears that there is no abuse of process in the filing of the second *habeas corpus* application. The preliminary objection is therefore dismissed.